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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 1301

JULIUS WEISBERG,
Petitioner,

vs.

ILLINOIS,
Respondent.

PETITION

FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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PETITION

FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Fred Vinson, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petition of Julius Weisberg by Wm. Scott Stewart, his counsel, respectfully shows to this Honorable Court:

A.

Summary statement of the matter involved. Summary of the record.

Your petitioner, a citizen of the United States, was prosecuted by indictment, charged with murder, and by final judgment of the Criminal Court of Cook County was sentenced to death. The Supreme Court of Illinois allowed a writ of error, which was made a supersedeas, and appellant is now in the County Jail. A petition for rehearing was overruled and the judgment made final on March 19, 1947. The date of execution was first set by the trial court and then again fixed by the Supreme Court. Then the date was prolonged by the Illinois Supreme Court to May 23, 1947, by authority of the statute, which provides that for good cause shown the court may prolong the date. Your petitioner secured the additional time upon his representation that he desired to make application here for relief under the federal constitution. Your petitioner applied to the Chief Justice of the Illinois Supreme Court for an appeal which was denied.

In Illinois a defendant may secure a review in any case but capital. In death cases the Supreme Court has a discretion (Ch. 38. Div. XV). The conclusions on the questions of fact are so interwoven with the decisions of the questions of constitutional right that one necessarily involves the other, therefore, your petitioner is compelled to request an examination of the facts here.

The defendant, known as Dolly, and the man dead, Joseph McKnight, were customers in a downtown saloon in Chicago. They had no previous dealings and had not been in each others company more than fifteen minutes.

Both had been about the place all evening and had become intoxicated to the extent that the saloon keeper had ordered that they not be served any more liquor (Abst. 40, 41). McKnight became abusive and searched the defendant for a weapon (Abst. 41, 84, 87). This was observed by Morrow, the manager of the saloon (Abst. 35). The attention of the other witnesses was attracted after the shooting had commenced (Abst. 45, 47, 60, 62, 68, 75, 76). The defendant claimed that the gun was brought into play by McKnight (Abst. 84), and that he gained control of it in the struggle and shot to save himself (Abst. 85). The case involves a barroom quarrel wherein the defendant claimed self-defense. If the testimony of the defendant had been believed he would have been acquitted—assuming the truth of every bit of the evidence against the defendant, we submit that the penalty of death should shock one's sense of justice.

The record prepared for our Supreme Court consisted of a transcript of the common law record, as kept by the clerk of the trial court, and a bill of exceptions, containing the testimony and all other proceedings before the trial court. This record was printed in the form of an abstract which will be found to be quite full—having been prepared to meet the approval of all concerned. This printed record has been certified to this court by the clerk of our Supreme Court. We here supply a brief guide to the testimony.

Herman Garfinkel (Abst. 44) was in the barroom but fled before he was able to locate where the shots were coming from (Abst. 45). Two of the waitresses, Della Lawrence (Abst. 75) and Lillian Cord (Abst. 76) testified to hearing shots and fleeing, but claimed no knowledge of the circumstances of the shooting.

Three sailors, Edward Blakey (Abst. 46), Vincent

Motzel (Abst. 58) and Ernest Sweet (Abst. 67) testified that they were at the other end of the bar when their attention was attracted by shooting. Blakey testified (Abst. 47) that after he heard the shots start, he stood up and saw Weisberg shooting. The sailors said they fled from the place also. They claimed to have heard the defendant say afterwards, with profanity, that he had shot McKnight. The police were called and Officer Hoy (Abst. 77) testified to conditions found in the barroom after the defendant had left. McKnight was removed to a hospital where he died the next day. No statement by him was proved. Officer Walsh (Abst. 81) testified to the arrest of the defendant shortly after the shooting. The widow (Abst. 25), Dr. Levinson (Abst. 79) and Dr. Huston (Abst. 82) furnished evidence to establish the cause of death.

The defendant gave his version (Abst. 83) and called no other witnesses. The State examined Officer Connelly (Abst. 90), in rebuttal, concerning a conversation with the defendant after his arrest.

An Illinois statute (Criminal Code Ch. 38 D. v. XIII sec. 729) requires a list of witnesses. The Supreme Court of Illinois has found (p. 5) that the prosecutor willfully violated this statute but has held that the defendant is not in a position to claim error on this ground. That (p. 5) "this action of withholding names of witnesses against the defendant until the beginning of the trial is not alone sufficient to reverse a judgment." After all of the circumstances are perceived we submit that your honors should reverse for the same reason as in those cases where the prosecutor knowingly makes use of perjured testimony. The shooting took place in the presence of over a hundred people in a crowded saloon on October 23, 1945. At the arraignment in November the defense was furnished with

four names which included only one eyewitness, Morrow (Abst. 1). The trial was held over five months later, and the record shows that the defense secured a number of court orders for a complete list of witnesses. The prosecutor filed false lists and told falsehoods in Court as condemned by our Supreme Court (Abst. 2, 3, 5, 6, 7, 10, 11, 13, 17, 18, 19, 25). His three main witnesses were not revealed until the jury was sworn. The witnesses, acting under instructions from the prosecutor, refused to answer questions put by defense counsel just previous to taking the stand (Abst. 52). When counsel claimed surprise and requested time in which to learn something of the witnesses the prosecutor handed counsel statements made by the witnesses to the police, just after the shooting (Abst. 26). The prosecutor knew at the time he delivered said statements that the witnesses intended to testify differently, and that they intended to claim that their police statements were false. The witnesses testified that the statements were made to deceive the police, in order that they would not be held in Chicago as material witnesses. The prosecutor knew all of this, but withheld his knowledge, and implied that the witnesses would testify as in their statements. The record discloses that while the prosecutor was claiming to the court that he knew of no witnesses not on his false list, the prosecutor was making trips out of his State to interview these witnesses, months before the trial (Abst. 69). With the help of local police the prosecutor had the witnesses brought to a police station near home and exhibited pictures of Weisberg. It is apparent that by various means the prosecutor prevailed upon these witnesses to support a theory of prosecution detrimental to the defendant and not based upon the facts. We claim that this was perjury, knowingly used as perjury, against this defendant. In *Avery* v. *Alabama*, 308 U. S. 444, 450, this court noticed the circumstance that the case was tried

in a rural community and that unlike metropolitan centers, people in these rural counties know each other and information concerning witnesses and events is more widespread and more generally known than in large cities. Here we present the opposite, a large city and surprise witnesses from distant places, members of the armed forces. Circumstances combined with the flagrant misconduct of the prosecutor to deny Weisberg an opportunity to prepare his defense, and we contend that the appearance of counsel was a mere sham. Although our Supreme Court condemned the conduct of the prosecutor, as an attempt to evade the statute, our further claim, that the prosecutor made use of perjury, is not mentioned. Our Supreme Court notes that the defendant was furnished statements made by these witnesses, but that court neglects to say that the statements were false and calculated to deceive. The Supreme Court states that the defense did not ask for a continuance, but neglects to say that the trial court suggested to counsel for the defense that the trial proceed, and that if it appeared that more time would be required the court would allow it (Abst. 19). Our Supreme Court correctly held (p. 6) that the trial court had a discretion, and further that the law affords a defendant the right of a new trial and a review. Such rights are idle of course, if denied in a situation like the one at bar.

While Weisberg was in jail awaiting trial and during his hearing his case received considerable newspaper publicity and at the same time the newspapers were filled with the revolting details of another murder case, having no connection with Weisberg. A little girl named Degnan had been abducted from her bed during the night and murdered. Parts of her body had been found in various sewers in the vicinity. The prosecutor in his closing argument told the jury (Abst. 117) that the defense lawyers

would use the same method of defense for the killer of the Degnan girl as that employed in the case at bar. The prosecutor invited the jury to visit the court room when the Degnan case was tried to listen to the defense counsel. When an objection was made the court said to the prosecutor, "I wouldn't proceed any further on that," (Abst. 118). Our Supreme Court stated (p. 12) that it was of the opinion that these remarks could have been left unsaid and that court holds that the remarks were provoked by defense counsel. We contend that this is not sufficient answer, and that our Supreme Court refused, although requested, to apply the settled law of the state. Weisberg was unable to prevail upon our Supreme Court to even mention cases where this very misconduct had been held to be ground for reversal—decisions wherein our Supreme Court had said that it would be difficult to suggest a case that would arouse the prejudice and passions of the jury more than the reference by the prosecutor to the murder and mutilation of a little girl.

We contend that the undisputed circumstances of the killing introduced by the prosecution show manslaughter and not murder. Yet this issue was taken from the jury by the court, and the prosecutor submitted the case upon the erroneous theory that there was no manslaughter, that this was murder or nothing. Our Supreme Court has answered this point by a reference to cases properly holding that a defendant cannot complain when he does not offer proper instructions—but our Supreme Court refused to recognize the fact that the error complained of was in the manner in which the case was submitted by the court, at the request of the prosection. Our Supreme Court has said here that contrasting sets of fact presented materially different situations for the jury. We contend here that there was no dispute as to those matters which should have reduced the penalty,—if the case had been

fairly tried and properly submitted. The assault by the deceased, and his insults given the defendant, were proved by the state and confirmed by the defense.

The trial court improperly instructed the jury on a presumption arising from the flight of the defendant (Abst. 123). Our Supreme Court found (p. 11) that this was error, as the defendant did not flee. He went to his home nearby, where the officers were waiting to arrest him. Our Supreme Court said that it could not see how the verdict was affected, but failed to consider the probable harm of this error, and refused to consider the error in conjunction with further misconduct of the prosecutor. The prosecutor argued to the jury (Abst. 98) that it was the duty of Weisberg to remain at the scene of the killing or to surrender himself to a policeman if the killing were to be excused or justified. Our Supreme Court said (p. 11) "We have not been cited to, nor do we know of, any law requiring this on the part of a man who has killed another, as he claims, in self-defense." Yet our Supreme Court would pay no heed to our claim, that the trial court permitted the prosecutor to convict Weisberg upon assertions that such was the law.

The defendant refused to give the police a statement. During the cross-examination of the defendant (Abst. 89) the prosecutor insisted upon repeating the questions asked by the police and showing that the defendant had refused to answer the police. Then the prosecutor improperly argued to the jury (Abst. 96, 117) that the defendant was not to be believed because he did not tell his story to the police—that the jurors and the prosecutor under similar circumstances would have made a police statement. Our Supreme Court makes no mention of this misconduct, although it has been previously condemned in other cases. The prosecutor also improperly claimed in his argument

(Abst. 115) that it was the duty of the defense to produce the clothing worn by deceased.

In a long unbroken line of previous cases our Supreme Court has held—that although our statute recognizes no degrees in the crime of murder, yet by providing such a wide range of punishment, it clearly recognizes the fact that the crime may be committed under circumstances manifesting different degrees of turpitude—and that a defendant has a right not only that his guilt or innocence should be determined fairly,—but also to have his punishment fixed with reference only to the circumstances of the crime. Weisberg was unable to prevail upon our Supreme Court to follow these applicable precedents, or to even mention them. We contend that such a departure from the usual and prescribed method of trial violates the guarantee of due process. We are unable to account from the record for any reason why Weisberg should have been singled out for special treatment. The racial question was interjected by the parties to the quarrel in the saloon,—and until some other reason appears, we are compelled to account for this dire result upon the ground that the jury was prejudiced against the defendant because of his race. Their passions were further inflamed by the misconduct of the prosecutor. Our State was in the possession of machinery intended to prevent a miscarriage of justice such as here presented, but for some reason, not explained it has failed to function. We contend that this court should require of a State—recognition that the process of condemning human life—is to be judged by standards higher than those shown to have been here applied.

B.

Basis of the court's jurisdiction.

This court may by certiorari have this cause certified to it for determination by virtue of Section 237 (b) Judicial Code 28 U. S. C., Section 344 (b) as supplemented by the Rules of this court, Rule 12, 38, 43.

C.

Questions presented.

1. Does the Fourteenth Amendment protect a citizen against loss of his life at the hands of a State, where a trial has been had for murder, and it appears, from the record before the Supreme Court of the State, that the usual method of trial has been departed from?

2. Is this court bound by conclusions made in the state court, that errors are harmless, in a capital case, where the penalty is death, or will this court examine the record to determine if there be any merit to the claim made here, under the due process clause, that the probable effect of the errors was prejudicial?

3. Is this court bound by conclusions made in the state court, that a defendant is not in a position to complain of errors existing in his trial, or will this court examine the record to determine if there be any merit to the claim made here, that this was merely a method adopted by the state court to evade the real question of due process?

4. Where it appears that the state statutes recognize no degrees in the crime of murder, yet by providing such a wide range of punishment they recognize that the crime may be committed under circumstances manifesting different degrees of turpitude and the Supreme Court of the

State has often held that a defendant has a right not only that his guilt or innocence should be determined fairly, but also to have his punishment fixed with reference only to the circumstances of the crime, will this court make an examination of the record, where a defendant sentenced to death claims here that the settled law of his state in this respect has been ignored—where the defendant claims here that the Supreme Court of the State refused to even mention the applicable decisions and held contrary to them that the errors probably had no effect upon the verdict?

5. Does an appeal to prejudice and passion in the argument of the prosecutor to the jury wherein he makes reference to an unconnected horrible murder case, and informs the jury that defense counsel intended to resort to the same defenses in the other murder case,—make it necessary for this court to examine the record in order to determine if there be any merit to the claim here that the state court disregarded the probable effect of this error—where the Supreme Court of the State has regarded the objectionable matter as proper retaliation on the part of the prosecutor?

6. Where a defendant sentenced to death is able to point to specific authorities, previous opinions of the Supreme Court of the State, condemning the very error complained of by him, and he complains here that the Supreme Court of his State refused to follow its own decisions, or to even mention them,—will this court examine the record and said previous opinions, to determine if there be any merit to the claim made by the defendant, under sentence of death, who claims here that the courts of his state have departed from the usual course of procedure and denied due process?

7. Will this court examine the record in a case where a defendant has been sentenced to death and claims here

that the laws of his State require higher standards for the process of condemning human life than those applied in his case?

8. Where a defendant, sentenced to death for murder, points to undisputed evidence, introduced by the prosecution, which should under the state law reduce the penalty, is this court bound by the finding of the Supreme Court of the State, that these facts were in dispute, or will this court examine the record to determine the validity of the claim made here that certain material facts were undisputed but ignored?

9. Where undisputed facts show that the killing might be manslaughter, and consideration of such crime was excluded, does a claim here of denial of due process require this court to examine the record to determine if there be any merit to the assertion that manslaughter was excluded by the trial court, at the request of the prosecution,—the Supreme Court of the State having found that there was no error on the ground that the defense did not request manslaughter instructions—and the defendant claiming here that the ground of decision was unsubstantial, because the previous decisions were inapplicable, and the State court has departed from the usual course of procedure and denied due process?

10. Where the State Supreme Court has said that there are contrasting sets of fact presenting materially different situations for the jury, will this court examine the record to ascertain if there be any merit to the claim that material undisputed facts, introduced by the prosecution and confirmed by the defense, were ignored and that the defendant was denied due process?

11. Where the State Supreme Court holds an instruction to have been error, but harmless, will this court examine the record to see if the effect may have been preju-

dicial as claimed here—where it is contended here that the State court refused to consider all of the circumstances, including the unfair use made by the prosecutor of the improperly stated rule of law?

12. Where it appears that the defendant endeavored to stand upon his constitutional right to remain silent and the prosecution improperly made use of this fact in cross-examination of the defendant and in argument—will this court examine the record, where it is claimed that due process has been denied and the State Supreme Court refused to mention or consider the error—and it is claimed further that this was an arbitrary departure from the usual course of proceedings?

13. Where a state adopts a statute, intended to prevent surprise and give a defendant an opportunity to combat false testimony, and it appears that the statute has been found by the State Supreme Court to have been wilfully violated—will this court be bound by the conclusion of the State Supreme Court, that the error was harmless, or will this court examine the record to determine if the defendant, sentenced to death, was in fact deprived of such effective aid of counsel as required by the Fourteenth Amendment, as part of due process?

14. Where a defendant sentenced to death claims here that the Supreme Court of his State has separated his various claims of error and held each one alone to be harmless and ignored some of the errors claimed, will this court examine the record to determine if due process and the usual proceedings require a consideration of the cumulative effect of the errors?

D.

Reasons for granting the writ.

1. The Supreme Court of Illinois has sanctioned a departure by the lower court from the accepted and usual course of judicial proceeding.

2. The Supreme Court of Illinois has decided federal questions in a way which conflicts with the decisions of this court.

3. There are peculiar circumstances here which cause us to put this case in the general class of some in which this court has intervened (*Powell* v. *Alabama*, 287 U. S. 45; *Mooney* v. *Holohan*, 294 U. S. 103; *Moore* v. *Dempsey*, 261 U. S. 86). Although the shooting took place in the presence of over a hundred people, those present were not produced, except the manager of the saloon (Abst. 30) who said his attention was elsewhere, and a couple of waitresses (Abst. 75, 76) who knew nothing. The defendant was denied bail without a hearing (Abst. 8) and held in jail for months while the prosecutor went about the country securing the testimony of three sailors (Abst. 46, 58, 67) who were produced as surprise witnesses. These sailors knew nothing to contradict the facts which should have mitigated the penalty, but they had returned from the wars and were passing through Chicago from the Pacific. They supplied bits of evidence calculated to prejudice the defendant and enhance the penalty. It is claimed that they committed perjury at the instigation of the prosecutor. The prosecutor argued that they were the only ones with courage enough to appear (Abst. 116). The question of race and that of returning war heroes was interjected by the prosecutor in a manner calculated to appeal to prejudice and passion. Many rights ordinarily given to a defendant were arbitrarily

denied. The prosecutor seemed to have believed that the end justified the means. The whole proceeding was but a mask. The Supreme Court of Illinois not only refused to correct the errors, and refused to follow its own decisions, but refused to even mention well settled cases condemning the very misconduct shown by this record.

The misconduct of the prosecutor in the cross-examination of the defendant concerning his failure to explain his defense when arrested and the argument of the prosecutor to the jury that the defendant was not to be believed as witness, because he stood upon his right to silence upon arrest, the argument of the prosecutor that the defendant was obliged by law to remain at the scene of the crime, and the burden was upon him to produce the clothing of the deceased, coupled with an instruction throwing a presumption in the scale against the defendant because of flight, when there had been no flight,—all combined to deprive the defendant of fundamental rights concerning the burden of proof and the presumption of innocence.

4. It is claimed here that any one in the community at all familiar with undisputed facts will agree that the death penalty was not intended by State law to be inflicted as the result of a drunken brawl in a saloon.

5. The process of condemning human life should be judged by standards higher than those applied here by the State, if due process, as guaranteed by the federal constitution, is to have any effect.

6. A defendant charged with murder and sentenced to death cannot be said to have been accorded due process when it appears that he was deprived of effective aid of counsel. If a prosecutor is to be permitted to practice deceit in violation of laws intended to prevent surprise, a defendant may just as well be in court without counsel.

E.

Prayer.

Your petitioner has filed the record of the Supreme Court of Illinois in this case, and has endeavored to comply with the rules of this court in all other respects, and prays that such orders be entered as may be required, that your Honors to take jurisdiction by certiorari, and the judgment be reversed, and your petitioner be afforded such other and further relief in the premises as to this Honorable Court may seem just.

Respectfully submitted,

JULIUS WEISBERG,
Petitioner.

WM. SCOTT STEWART,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, A. D. 1946.

JULIUS WEISBERG,
Petitioner,
vs.
ILLINOIS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The opinions of the court below.

The trial court rendered no opinion. The opinion of the Supreme Court of Illinois is in the record and has not been reported. It will appear in the official reports and the advance sheets, also in the North Eastern Reporter.

II.

Jurisdiction.

Judgment was first entered in the trial court and then affirmed in the Supreme Court of Illinois, the highest court of the state. Under the rules the judgment was not final until the Petition for Rehearing was denied on March 20, 1947.

Our claim that due process, as a federal right, was denied was presented to the trial court (No. 36, Abst. 134) and in the Supreme Court (No. 27, Abst. 138). The opinion does not mention our claim of federal rights, but they were necessarily overruled or disregarded. We believe that questions of substance are here presented and that the principles which should be applied are to be found in the decisions of this court. We do not believe that some of our particular questions have been decided.

III.

Statement of the case.

We refer your Honors to our petition for a statement of the case.

IV.

Specification of errors.

1. The improper conduct of the prosecutor deprived the defendant of a fair trial and brought about the extreme penalty. 2. The court erred in not declaring a mistrial and postponing the hearing when the circumstances under which the testimony of Blakey, Sweet and Motzel appeared at the trial. 3. The errors committed were such that the defendant was deprived of due process and the equal protection of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. 4. In holding that the errors did not affect the result, the Supreme Court of Illinois deprived the defendant of trial by jury as included in due process. 5. The defendant was deprived of his right to stand upon his constitutional right to remain silent when arrested. 6. The defendant was deprived of his right not only that his guilt or innocence should be determined fairly but

also to have his punishment fixed with reference only to the circumstances of the crime of which he was convicted. 7. The defendant was deprived of his right to have the jury decide whether he was guilty of the lesser crime of manslaughter. 8. The court erred in instructing the jury that they might consider the flight of the defendant where there is no such evidence. 9. The court erred in the matter of giving instructions. 10. The wilful violation of the statute in regard to a list of witnesses was a step in the denial of due process. 11. The prosecutor knowingly used perjured testimony. 12. The prosecutor deprived the defendant of his right to remain silent under accusation by the police, by improper cross-examination upon the subject and use of the fact in argument. 13. Reference by the prosecutor, in argument, to an unconnected horrible murder, prejudiced the defendant to his right to a fair trial. 14. The error of the court in an instruction on flight and the use made by the prosecutor of this inapplicable rule of law was harmful. 15. The law of the state requires a higher standard than that applied here. 16. The defendant has been made the victim of unlawful discrimination. 17. The prosecutor resorted to unfair methods to secure a conviction and the state courts have failed to relieve the defendant of the result. 18. The conduct of the trial was so unfair that the defendant had no chance of free consideration of his defenses. 20. The misconduct of the prosecutor relating to the list of witnesses deprived the defendant of the effective aid of his counsel. 21. The penalty inflicted is excessive and demonstrates the effect of the prejudicial nature of the errors committed.

BRIEF.

I.

The errors committed deprived the defendant of due process of law as guaranteed by the constitution and laws of the State of Illinois and the fourteenth amendment of the constitution of the United States.

Palko v. *Connecticut*, 302 U. S. 319, 327.
Powell v. *Alabama*, 287 U. S. 45.
Mooney v. *Holohan*, 294 U. S. 103.
Moore v. *Dempsey*, 261 U. S. 86.
Snyder v. *Massachusetts*, 291 U. S. 97, 105.
Brown v. *Mississippi*, 297 U. S. 278, 285.
Herbert v. *Louisiana*, 272 U. S. 312, 316.

II.

It is our claim here that the refusal of the State court to apply the established law denied petitioner the equal protection of the laws. We therefore include a reference to State law. In determining whether or not due process of law has been denied regard must always be had to the character of the proceeding involved for the purpose of determining what the practice in this country has been in like cases.

Twining v. *New Jersey*, 211, U. S. 78, 100.

III.

It is indispensable to a conviction for murder that the killing be done with malice aforethought, express or implied, otherwise the offense, under the statute, is manslaughter.

People v. *Bissett,* 246 Ill. 516, 521.

IV.

Matters outside the evidence of a local nature should not be commented on in argument.

People v. *Chrfrikas,* 295 Ill. 222, 227.
People v. *Fitzgerald,* 322 Ill. 54.

V.

The defendant had a right not only that his guilt or innocence should be determined fairly, but also to have his punishment fixed with reference only to the circumstances of the crime of which he was convicted.

People v. *Lane,* 300 Ill. 422.
People v. *Heffernan,* 312 Ill. 66.
Nowacryk v. *People,* 139 Ill. 336.
People v. *Winchester,* 352 Ill. 237.

VI.

The defense should not be charged in argument with the failure to produce witnesses.

People v. *Rubin,* 366 Ill. 195, 198.
People v. *Munday,* 280 Ill. 32.

VII.

The prosecutor must confine himself to the facts introduced in evidence and to the fair and reasonable deductions and conclusions to be drawn therefrom.

People v. *Melnick*, 263 Ill. 24.
People v. *Pfanschmidt*, 262 Ill. 411.
People v. *Weitzman*, 362 Ill. 11, 23.

VIII.

If the evidence of guilt is such that the State's attorney believes a conviction is warranted it is his duty to try to secure a verdict of guilty by a proper and forceful presentation of the case to the jury, both in the introduction of testimony and in the argument, but it is never the duty of the State's attorney to resort to unfair and improper methods to secure a conviction.

People v. *Black*, 317 Ill. 603, 618.
People v. *Weitzman*, 363 Ill. 11, 23.
People v. *Deal*, 357 Ill. 634, 642.
People v. *Cepek*, 357 Ill. 560, 570.
People v. *Sicks*, 299 Ill. 282, 285.
People v. *Munday*, 280 Ill. 32, 40.
People v. *Bimbo*, 314 Ill. 449.
People v. *Rothe*, 358 Ill. 52, 57.
People v. *Black*, 367 Ill. 209, 213.

IX.

The statute provides that every person charged with murder shall be furnished with a list of witnesses.

Crim. Code Ch. 38, Div. XIII, Sec. 729.

X.

The defendant was entitled to have instructions given concerning any state of facts which the jury might legitimately find to have been proved by the evidence.

People v. *Renick,* 368 Ill. 436, 441.

XI.

The jury should not be instructed that they may consider the flight of the defendant where there is no such evidence.

People v. *Herbert,* 361 Ill. 64, 73.
People v. *White,* 333 Ill. 512, 521.

XII.

It was error to permit the prosecution to prove that the defendant refused to make a statement to the police.

People v. *Rothe,* 358 Ill. 52, 57.

XIII.

Fourteenth Amendment requires that state criminal proceedings shall be consistent with the fundamental principles of liberty and justice.

Herbert v. *Louisiana,* 272 U. S. 312, 316.
Mooney v. *Holohan,* 294 U. S. 103, 112.
Buckhalter v. *New York,* 319 U. S. 427, 429.

XIV.

No formula to determine this question by its application to the facts of a given case can be devised.

Hopt v. *Utah*, 110 U. S. 574, 583.
Betts v. *Brady*, 316 U. S. 455, 462.

XV.

It is the duty of this court to make an independent examination of the defendant's claim, which cannot be foreclosed by the finding of the state court, the verdict of the jury, or both.

Ashcraft v. *Tennessee*, 322 U. S. 143.

XVI.

The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as "the law of the land."

Herbert v. *Louisiana* 272 U. S. 312, 316.
In re Kemmler, 136 U. S. 436, 448.
Caldwell v. *Texas*, 137 U. S. 692, 697.
Lisenba v. *California*, 314 U. S. 219, 236.

ARGUMENT.

MAY IT PLEASE THE COURT:

The Death Penalty

If the State of Illinois punished all felons with the extreme penalty our right to complain here would be doubtful. We have no degrees of murder in Illinois—a killing may be excusable, justifiable or it may warrant fourteen years, or any number of years to life, or the death penalty. The killing may be reduced to manslaughter punishable by an indeterminate sentence of one to fourteen years. All of this is defined in the Criminal Code, Chapter 38 of our statutes, under Homicide. The question of punishment ordinarily is a question for the jury. Our complaint here is that, although the state has set up machinery by which to determine the questions involved, that machinery was disregarded in the case at bar. We are able to point in the record to specific errors calculated to bring about the death penalty. These errors were complained of in the State Supreme Court where they were either ignored, held to be harmless, or said not to be available for one reason or another. The general impression created from the opinion of the Supreme Court of Illinois, is that errors had been committed but that they were harmless. This, we submit, is merely a method of admitting the wrong and denying judicial relief in this particular case. Such conclusions are not binding upon the federal courts. Although the federal constitution does not require that a State provide for an appellate review, it is obvious that where a defendant has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as part of the pro-

ceedings (*Frank* v. *Mangum,* 237 U. S. 309, 327). We do not ask this court for any general review over the proceedings—but in determining whether or not the fundamental rights of the defendant have been taken from him arbitrarily without the usual course of law, it will be necessary for us to request here an appraisal of the opinion.

If all questions of law and fact were conclusively determined against the defendant, by the decision of the state court of last resort, no one could prevail here. Every defendant must bring here an adverse decision. We expect this court to approach our contentions with the thought that our Supreme Court has fairly and justly performed its duty, and further that the defendant is bound by the decision below. The burden is upon us,—and the importance of the issue requires close attention to details. We assume that it is the duty of this court to declare lynch law as little valid when practiced by a regularly drawn jury, as when administered by a jury converted into a mob by the manipulations of the prosecutor.

We request that this court grant certiorari in order that our claims of denial of a federal right might be examined in the light of the record with the aid of oral argument (*Buckhalter* v. *New York,* 319 U. S. 427, 429). This court has brought cases here where life is at stake and has expressed solicitude for those liberties which are guaranteed by the Fourteenth Amendment (*Hysler* v. *Florida,* 315 U. S. 411, 413). We expect to sustain the burden of showing essential unfairness as a demonstrable reality (*Adams* v. *McCann,* 317 U. S. 269, 281). We here contend that such substantial error was committed as to require reversal, that the conduct of the trial was so grossly unfair as to leave Weisberg without a remote chance of free consideration of his defenses before the

jury; so unfair as to deprive him of the presumption of innocence and the requirement of proof beyond a reasonable doubt.

We have omitted mention here of errors which might be regarded as errors of state law alone. We contend here that certain errors constituted more than violation of state law, but were such as to deprive petitioner of a trial according to the accepted course of legal proceedings. Petitioner has exhausted all of his state remedies. When a judgment is affirmed by the Supreme Court, all questions that might have been so raised, are to be regarded as finally adjudicated against the plaintiff in error, and the judgment must be regarded as free from all error. (*The People* v. *Superior Court,* 234 Ill. 186.) So the writ of habeas corpus has been held to be not available. We have a statute on *coram nobis* but the proceedings are not at all applicable. The errors we complain of here were made known to the trial court and to the court of review. The law of the state affords no remedies but those exhausted, i.e., motion for new trial and writ of error in the Supreme Court.

The atmosphere concerning race was made more unfavorable to Weisberg by the fact that the prosecutor produced war heroes as witnesses. Such incidents might arise in any trial, and ordinarily a defendant would be compelled to accept the verdict, but here the prosecutor misrepresented the law and presented his case upon a theory not authorized. We contend here that the statements of the prosecutors in their addresses to the jury were so unfair as to deprive the trial of the essential quality of an impartial inquiry into guilt and a fair consideration of the question of penalty. We quote from the closing arguments (Abst. 92):

> "Mr. Grant (the prosecutor): 'The argument was something like this, that the Irish can't make money

like the Jews can, the defense putting a little different story on this, but in substance, it is the same. That after that was said, McKnight said something back to Weisberg that certainly wasn't complimentary, certainly Weisberg would have a right to become angry about it, but as I will point out to you later more completely, even if he became inflamed by that remark, under our law it would not give him the right to kill.' "

The prosecutor never did "point out more completely" how under our law if Weisberg became inflamed he had no right to kill. Of course Weisberg had no right to kill, merely because he became inflamed, but if the prosecutor was to take upon himself the duty of instructing the jury in his argument, he should have included the circumstances which in law might reduce the crime to manslaughter. It is fair to say that the average jury in a greater or less degree has confidence that the obligation of the prosecutor will be faithfully observed. Consequently, improper suggestions, insinuations and assertions are apt to carry much weight against the accused when they should properly carry none. (*Berger* v. *United States,* 295 U. S. 78, 88.) See also 23 C. J. S. sec. 1110, p. 590.

This improper argument was followed by instructions based upon the same improper theory. Manslaughter was improperly eliminated and the jury was instructed to find the defendant guilty of murder or nothing. In *Hart* v. *Virginia,* 298 U. S. 34 a convict was sentenced to death and claimed that the statute as construed eliminated self-defense and manslaughter. This court noticed that the trial court defined with care the right to self-defense and dismissed the appeal. It seems to follow that if the trial court had instructed the jury, as in the case at bar, that the crime was murder or nothing, this court would have examined further into the federal question.

Our Supreme Court ignored the effect of the improper argument and held that there was no error in the instructions.

If we could complain here of only one or two of such instances your honors might accept the conclusions of our Supreme Court, and regard Weisberg as just another dissatisfied litigant. But we are able to pile up the errors until it can be seen that Weisberg has been denied the equal protection of the established law of Illinois. No reason for the death penalty can be shown—therefore the conclusion cannot be resisted, that no reason for it exists —except hostility created in the trial court to the race to which petitioner belongs. Which hostility, in the eye of the law, is not justified. Discrimination is illegal, and the administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment (*Yick Wo* v. *Hopkins,* 118 U. S. 356, 374; *McFarland* v. *American Sugar Co.,* 241 U. S. 79). This court indicated in *United States* v. *Classic,* 313 U. S. 299, 327, speaking of section 20 of the federal Criminal Code, that it would be difficult, if not impossible, to determine whether the denial of constitutional rights was on account of alienage, color, or race. In the case at bar we can only assert that in the trial court Weisberg may have encountered a prejudice engendered partly by his race, and that the misconduct of the prosecutor aggravated the injury. All we can say about the Supreme Court is that it failed to appreciate the fact that Weisberg was being punished more severely because of his race and that that court failed to enforce established rules intended to prevent such a miscarriage. We do not charge that this failure on the part of the Illinois Supreme Court was wilful, nor do we believe that the trial court intended to discriminate against Weisberg, because of his race. If we are required to establish a wilful discrimina-

tion, and to prove that it was because of race, we will be unable to secure relief here on that ground. Still we submit that the racial question cannot be lost sight of if any effort is to be made in understanding how it happens that the death penalty is decreed in this particular case which should have been manslaughter if not an acquittal. It may help this court to understand how it happened that the defendant was denied the rights ordinarily given defendants in our state, if your honors will examine the record (Abst. 9) where the defense applied for bail. The trial judge consulted the statute and endeavored to conform to the practice, stating that "to be perfectly candid with you, this is the first application of this sort I have had." Then the prosecutor proceeded to make a false statement as to the practice and the court merely followed the direction of the prosecutor. There was no appeal from this order, and the ruling is not before this court, but the incident should throw some light upon the reason for the discrimination. The trial judge was new and inexperienced and we believe that the record shows that the court permitted an overzealous prosecutor to dominate the trial and to ride rough shod over the court, the defendant and his counsel. In *Mooney* v. *Holohan,* 294 U. S. 103, 112, this court held that the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its law, may constitute state action within the purview of the Fourteenth Amendment.

Improper Argument of Prosecutor.

At the time of the trial the Chicago newspapers were filled with the details of a horrible murder. A little girl named Degnan had been kidnapped from her bed and murdered. Parts of her dismembered body had been found about the vicinity. It was a dastardly and atrocious

crime that induced an enraged community. It naturally aroused great and well justified public indignation, but Weisberg had nothing to do with it. The prosecutor made use of this in his appeal to prejudice before the jury (Abst. 117).

Some years ago some fiend had murdered a little girl named Janet Wilkinson. Her body, too, had been found mutilated. In the trial of another defendant in a different case a previous prosecutor had made use of the fate of the Wilkinson girl in his appeal to the prejudice of the jury. Our Supreme Court reversed this conviction (*People* v. *Chrfrikas,* 295 Ill. 222, 227) and said:

> "In proceedings of this character it would be difficult to suggest a case that would arouse the prejudices and passions of the jury more than the reference by the prosecutor to the Janet Wilkinson case."

Although the same error was committed in the case at bar Weisberg could not prevail upon our Supreme Court to even mention the *Chrfrikas case.* We submit here that a mere mention of the improper argument will cause your honors to perceive that no excuse can be found for it and that it would be difficult to suggest a case that would arouse the prejudice and passions of the jury more. Particularly when your honors keep in mind that the jury had before it the question of penalty. A constitutional question properly raised in a state court may not be evaded by a decision on a non-federal ground that is unsubstantial and illusory (*Lawrence* v. *State Tax Comm.,* 286 U. S. 276).

Our Supreme Court has repeatedly held that the defendant had a right not only that his guilt or innocence should be determined fairly, but also to have his punishment fixed with reference only to the circumstances of the crime of which he was convicted. (*People* v. *Lane,* 300 Ill. 422;

People v. *Heffernan*, 312 Ill. 66; *Nowacryk* v. *People*, 139 Ill. 336; *People* v. *Winchester*, 352 Ill. 237.) But Weisberg was unable to prevail upon our Supreme Court to even mention these cases.

A reference had been made by one of the defense lawyers, to the same case (Abst. 107), but in a different connection. The defense lawyer was using the arrest of innocent suspects who were held and abused by the police in the Degnan case. This was in answer to the point made by the prosecutor (Abst. 99) that Weisberg should have surrendered to the police at the scene of the killing. At about the time Weisberg had failed to stay at the scene of the shooting, an innocent janitor had been arrested, held without warrant and abused by the police in the Degnan case. A local matter, known to the defendant, may have been a proper source of argument on behalf of the defense, in answer to the State, in a discussion of what may have been in the mind of the defendant. The point made by defense counsel is clear. He was explaining one reason why Weisberg may have been prompted to go home after the shooting. Weisberg claimed that he wished to see a lawyer before he made any statement (Abst. 107). This, we submit, did not open the door to the vicious argument made by the prosecutor. The prosecutor followed up with reference to a man, Heirens, who subsequently confessed the crime, in the Degnan case,—an entirely different situation. The prosecutor was not speaking to the point first raised by the prosecutor in the opening, and under no circumstances should the prosecutor have assumed the right to argue that Weisberg was not entitled to have his lawyers appear and defend,—because such lawyers might also defend Heirens, who confessed three brutal murders, including dismemberment of the little Degnan girl. The argument made by the prosecutor was that no attention should be paid to the defense in the

Weisberg case because such a defense would also be put in by lawyers on behalf of the confessed murderer in the Degnan case. There can be no excuse for such conduct. The mild admonishment of the court couldn't be said even to be a disapproval. We speak freely of local matters because our Supreme Court has taken it for granted, in previous decisions that everyone in our community knows of such cases as those mentioned, such as the Loeb, Leopold case, the Janet Wilkinsen case, etc. (*People* v. *Chrfrikas,* 295 Ill. 222, 227; *People* v. *Fitzgerald,* 322 Ill. 54).

Your Honors will notice from the record (Abst. 117) the manner in which the prosecutor continued on with his point after counsel objected. We quote from the opinion of our Supreme Court in the case at bar (p. 12):

> "We are of the opinion that while the mention of the Degnan girl in the State's Attorney's remarks could have better been left unsaid, it had nothing to do with the crime in that case nor the punishment that should be given, but was only in reply to the accusation of the defense attorney as to the State's Attorney's unfairness. He invited the jury to come in and watch the trial of that case, if it ever came up, and said the jurors would observe the defense attorneys would do the same thing in that case as he contended they were doing in the present one. It has been very frequently held an attorney for the defendant cannot provoke a reply to his own improper argument and then claim error. *People* v. *Fricano,* 302 Ill. 287; *People* v. *Fricker,* 320 Ill. 495."

We submit that an attack upon a prosecutor for unfairness cannot justify that officer in further misconduct. The unfair prosecutor often becomes a target before the jury. If he is to be permitted to throw down the bars, and retaliate in this manner—how can this be said to be a trial at all? Is it not more like an appeal to the mob? Do not the proceedings become but a mask? In Corpus Juris Secundum, Vol. 23, section 1108, p. 587, after a state-

ment of the general rule, cases are cited in support of the rule that even retaliatory remarks are reversible error, where they go beyond a pertinent reply, and bring before the jury extraneous matter necessarily prejudicial. Two Illinois cases are cited, *People* v. *Young*, 316 Ill. 508 and *People* v. *Flynn*, 302 Ill. 549. In neither of these cases did the jury have anything to do with penalty and it is quite certain that Illinois intends to follow the general rule that the fact that counsel for accused has committed an impropriety in making remarks is no excuse for the prosecuting attorney to make similar remarks. (*People* v. *Bimbo*, 314 Ill. 449, 453). It was the duty of the trial court to see that the defendants received a fair trial (*People* v. *Black*, 317 Ill. 603, 618). In *People* v. *Gardiner*, 303 Ill. 204, 207, our Supreme Court said that a defendant was entitled to be tried in accordance with the law of the land, a right to a trial by jury and not in a court of review.

In *United States* v. *Socony Vacuum Oil Co.*, 319 U. S. 150, 240, your honors took into consideration all of the circumstances and regarded the comments complained of as isolated, casual episodes and not reflective of the quality of the argument as a whole. The opposite is true here. The prejudicial argument is only one step in a program intended to deprive Weisberg of due process, and is reflective of, not only the quality of the argument as a whole, but characteristic of the unfair tactics of the prosecutor. As this court said in *Berger* v. *United States*, 295 U. S. 78, 88:

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded."

Our Supreme Court said further (p. 12):

> "There are a number of other remarks made by the State's Attorney claimed to have been improper and erroneous, to which no objection was made, and no exception taken. Errors cannot be assigned on arguments unless objections are made to the same in the course of the argument, and ruled upon by the court. *People* v. *Anderson,* 239 Ill. 168."

This would seem to put us out of court here on adequate state ground—but our Supreme Court was not requested to reverse because of any remarks to which no objection was made. Such remarks were pointed out to prove that the misconduct, of which we had a right to complain, was intentional and deliberate. Also the argument not objected to, was used by Weisberg in the Supreme Court in his effort to show there that in conjunction with the instructions, the trial court permitted the prosecutor to prevail before the jury on a theory not sanctioned. As this court observed in *Berger* v. *United States,* 295 U. S. 78, 88, it is impossible without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate the extent of the misconduct.

The improper remarks about the Degnan girl were objected to—and the point was preserved. If such a point is to be lost because the prosecutor had a right to retaliate as against the charge that he was unfair— our Supreme Court has introduced a new rule, so grossly unfair as to be a denial of due process. As this court said in *Mooney* v. *Holohan,* 294 U. S. 103, 113:

> "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."

Mitigation of Penalty.

The Illinois Supreme Court refused to recognize the effect of undisputed evidence produced by the prosecution. At the outset of the opinion (p. 3) after describing the assault made upon Weisberg by the deceased, our Supreme Court said:

> "Other than this, on the part of the prosecution, there was no evidence of assault upon the defendant by the deceased."

This, we submit, is like saying—there was nothing in the coffee to sweeten it but the sugar. This error by our Supreme Court was twice more repeated, i.e., (p. 13):

> "There was no claim of any assault made other than passing the hands over the clothing * * *."

We quote from the testimony produced by the state (Abst. 41):

> "McKnight ran his hands over Weisberg's body after he cussed him out, I believe." (Morrow Abst. 41). "McKnight said 'I don't want no part of you, you God damned Sheenie.'"

All of this is treated, first as mere claim and then as if it were in dispute. We complain that due process demands fair consideration of undisputed facts. We submit that upon its face, the opinion of the Supreme Court of Illinois shows that our claim here was disposed of upon insubstantial ground.

In *Ashcraft* v. *Tennessee*, 322 U. S. 143, this court formed its conclusion from facts which were not in dispute at all. In *Ward* v. *Texas*, 316 U. S. 547, 552, this court conceded that the disputed facts were conclusively resolved by the jury's verdict, and then based its conclusion upon the admitted facts. We quote from *Drivers Union* v. *Meadowmoor, Co.*, 312 U. S. 287, 293:

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made."

In the case at bar we submit that a search of the record will not only show insubstantial findings of fact, but also material omissions and faulty conclusions from the facts found. By reason of the responsibility of this court to appraise the evidence, as it relates to constitutional rights, we expect to argue against some of the conclusions made by our Supreme Court.

The evidence discloses a quarrel between two intoxicated men. Our Supreme Court said (p. 13) that:

> "Evidence on the part of the prosecution would justify the jury in believing a quarrel arose between two partly intoxicated men * * *."

As the actual extent of the intoxication may have a bearing upon the question of the inappropriate penalty, we refer this court to the record.

McKnight had been a friend of the manager's for twenty-five years (Abst. 32). Weisberg frequented the place two or three times a week over a period of two years (Abst. 32, 38). The record shows both of these men were so drunk that their actions were not in their usual character. The foul language used by McKnight toward Weisberg surprised the saloon keeper (Abst. 34). Weisberg drank and drifted about the bar for about five hours. He had too much to drink, shown by his language and conversation (Abst. 39). The manager had not known Weisberg to become drunk there before (Abst. 38). McKnight continued to cuss Weisberg after the manager admonished him. It was then that his drinks were cut off

(Abst. 41). Then both Weisberg and McKnight were ordered out of the place (Abst. 41), noted on page three of the opinion. This evidence was produced by the prosecution and was not contradicted.

Judgments for murder have been sustained in Illinois against intoxicated men (*Bleich* v. *People,* 227 Ill. 80), but we have yet to see a case wherein the death penalty was deemed appropriate against such a man, particularly where the undisputed evidence showed a quarrel between two intoxicated men. As your honors know drunkenness is no excuse for crime, but it cannot, in law, be held to aggravate crime. It cannot aggravate an offense which, in law, is only manslaughter, if committed by a sober man, into murder, if done by a drunken man. Nor will it increase a minor offense to one of higher grade. (*McIntyre* v. *People,* 38 Ill. 514.) The language said to have been used by Weisberg, after the shooting, may be attributed to his drunken condition. On the other hand, it may have shown a bad heart. This was a question for the jury. The state court seems to have overlooked the fact that such important questions should have been submitted to the jury without error calculated to arouse passion. The extent of the intoxication, like so many facts in this case, merits close study.

This oversight, of the fact that enough evidence was put in by the prosecution, and confirmed by the defendant, to reduce the penalty, is evident in the second paragraph of the opinion, page thirteen. The state court correctly enumerates a number of important details which were in dispute, but that court failed to notice that the fact that both men were quarrelling and that deceased assaulted the defendant and called him vile names is not in dispute (Abst. 41, 84, 87).

Our Supreme Court failed to apply the rule that where

there is evidence from which might be drawn a reasonable inference that the crime was of lesser degree than the one of which the accused was convicted, it is prejudicial error to submit to the jury the consideration of only the higher degree of the crime. The instructions (Nos. 4 to 11 inclusive, Abst. 120 to 123) excluded manslaughter. Yet our Supreme Court would not say that these facts should have produced a lesser penalty. Our court, in one portion of the opinion, treated the case as if these facts were in dispute.

In *People* v. *Maertz,* 375 Ill. 478, 482 the defendants were convicted of destroying property. The defendants were shown to have belonged to some anti-semetic organization. Our Supreme Court reversed the conviction because of the probable prejudice created by the details of this proof. "It confused the issue and deprived defendants of a fair trial." It would have been impossible to try Maertz without some mention of the race question, but our Supreme Court realized that the matter was presented in such a manner as to prejudice the defendant. The jury had nothing to do with penalty in the *Maertz* case. Yet, Weisberg was unable to prevail upon the Supreme Court to consider the probable effect of the abuse given him by deceased—where Weisberg was called a "God damned Sheenie" an epithet at which he had a right to take offense. Nor could Weisberg prevail upon the Supreme Court of Illinois to consider the probable effect of the misconduct of the prosecutor where this racial question and the insults were discussed by the prosecutor in his argument (Abst. 92).

Inapplicable Instruction on Flight.

Weisberg left the saloon and went to his home nearby (Abst. 81). The police were waiting at his home and arrested him. This was not flight, yet the trial court gave an instruction (Abst. 123) concerning the effect of flight. Our Supreme Court said that this was error, but it was harmless. In argument (Abst. 98) the prosecutor took the position that the defendant was obliged to remain at the scene of the shooting or surrender himself to a policeman. The shifting of the burden of proof as an aid to the accuser, without subjecting the accused to hardship or oppression, has been held to be proper in criminal cases. But in the case at bar the conviction of Weisberg—because he failed to satisfy the jury that he had overcome the burden improperly put upon him by the prosecutor and the trial court—was denial of due process that vitiates the judgment against him (*Morrison* v. *California*, 291 U. S. 82). We trust that your honors will consider the errors in combination—and not separate them as did the Supreme Court of Illinois. The presumption arising from flight is within the limits of reason and fairness, but in a case such as this where the defendant went immediately to his home nearby after the shooting, there had been no flight. Our Supreme Court said:

> "The most natural evidence of flight would be to go in a different direction than toward his home. It seems the prosecutor thought, and argues, it is the duty of the defendant, whether guilty or innocent, to either remain upon the scene of the homicide, or to surrender to a policeman. We have not been cited to, nor do we know of, any law requiring this upon the part of a man who has killed another, as he claims, in self-defense. This instruction should not have been given, but we do not see where it could have reasonably affected the verdict."

This should be considered in connection with the other misconduct of the prosecutor and the action of the trial court in the matter of placing improper burdens upon Weisberg. We submit that the statement of our Supreme Court that it was unable to see how all of this could reasonably have affected the verdict should not dispose of our claims without further study.

Burden Thrown on Defendant.

The State failed to produce the clothing worn by deceased and then falsely claimed in argument (Abst. 115) that it was the duty of the defense to produce the clothing. Such argument is improper. (*People* v. *Munday,* 280 Ill. 32; *People* v. *Rubin,* 366 Ill. 195, 198). It is true that no objection was made to this improper argument and Weisberg was properly foreclosed on that ground. We call attention to the misconduct here for the same reason we did below, i.e., the prosecutor was permitted to obtain a conviction upon theories of his own as to the law.

Denial of Right to Remain Silent.

Weisberg when arrested refused to make any statement. The prosecutor improperly cross-examined upon this (Abst. 89) (*People* v. *Rothe,* 358 Ill. 52, 57) and argued that the defendant was not to be believed because he had refused to tell his side of it to the police (Abst. 96, 117). The point was properly preserved in the record (Abst. 89) and assigned as error, but the opinion of our Supreme Court is silent upon the point. "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked." (*Lawrence* v. *State Tax Com.,* 286 U. S. 276, 282.) In Illinois

the Supreme Court is required, under the practice, to write an opinion (Ch. 37, sec. 21).

Although the exemption from compulsory self-incrimination the courts of the States may not be secured by any part of the Federal Constitution (*Twining* v. *New Jersey*, 211 U. S. 78, 114). We submit that where a State has adopted the exemption as a fundamental right, its arbitrary disregard constitutes a denial of equal protection. In *Brown* v. *Mississippi*, 297 U. S. 278, this court refused to follow the state court in its finding that immunity from self-incrimination is not essential to due process and that there had been mere error reversible on appeal, but not a violation of constitutional right.

List of Witnesses.

The Statute (Criminal Code, Ch. 38, Div. XIII Sec. 729) is set out in the opinion of the Supreme Court of Illinois. Our court held that the names of the witnesses were wilfully withheld by the prosecutor but that the error was harmless. We quote from the opinion (p. 5):

> "In our opinion the attorneys for the People clearly attempted to evade this provision of the law, and prevented counsel for the defendant from talking with such witnesses, or from ascertaining facts about them which might affect their credibility. Obviously, this statute was adopted to prevent surprise and give defendant an opportunity to combat false testimony. However, this action of withholding names of witnesses against the defendant until the beginning of the trial is not alone sufficient to reverse the judgment."

In our Petition for Rehearing (p. 8) we endeavored to point out that we did not ask for reversal on this point alone. We asked our Supreme Court, and we ask your honors to accept this as part of our proof that the prose-

cutor deliberately deprived Weisberg of his rights. This particular denial prevented Weisberg from having effective aid of his counsel.

Your honors will notice that these surprise witnesses were not only non-residents but they were in the armed forces. The defendant and his counsel had no opportunity to investigate them or to learn anything about them in advance of the trial. In *Snyder* v. *Massachusetts*, 291 U. S. 97, 105, this court spoke of the manner in which a State is free to regulate the procedure of its courts.

> "What may not be taken away is notice of the charge and adequate opportunity to be heard in defense of it * * *. (116) Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. * * * (122) The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so foundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. * * * We are to keep the balance true."

After your honors study the record, considerable doubt will arise as to whether these sailors told something they saw and remembered or something suggested to them by the prosecutor. The jury knew from the protests made that the prosecutor had wilfully violated the statute, and when the trial court refused to do anything about it—the jury must have believed that there was something about this case requiring special and drastic measures. The prosecutor argued (Abst. 116) that no one but the sailors had the courage to take the stand against Weisberg. There were forty or fifty people present, but not produced, or accounted for (Abst. 41). If the police and the prose-

cutor were able to learn of their identity, surely the officials did not permit eyewitnesses to stay away from court, without any effort to compel their attendance, merely because the witnesses lacked courage. The witnesses were not present in court because the prosecutors couldn't find them, or they had been located, and the prosecutor chose not to call them. There was nothing in the record to justify the argument about courage. The witnesses for the State were in uniform and had just returned from the war. It may have pleased the prosecutor to dwell upon their courage as war heroes, as he did (Abst. 114), but it was unfair to say that it took courage to appear against the defendant. All of this must be considered in the antagonistic atmosphere created by the prosecutor upon the racial question. During the first world war a prosecutor condemned the defendant because he was not in the army in *People* v. *Kohn,* 290 Ill. 410, 418. This was held to be unfair. Courts of review often consider the setting in which misconduct takes place.

Our Supreme Court said (p. 6) that to deprive the trial judge of discretion might result in great injustice to the People, as in the event of an adverse verdict they cannot obtain a new trial, while, on the other hand, the defendant may not only obtain a new trial, but may have his case reviewed upon writ of error. The right of a defendant to apply for a new trial concerning a matter in which the trial judge is given a discretion is not of much practical value. Experience has taught that judges change their minds in a negligible proportion of cases, so the right to ask for a new trial is illusory. If a court of review refuses to interfere, in a case such as the one at bar, the right to a review is of no practical value. Where is the criterion? What is the limit of the discretion? Should it not be a legal discretion? A court must act judicially in all things (*Windsor* v. *McVeigh,* 93 U. S. 274, 282). We

submit that our Supreme Court refused upon unsubstantial grounds and that due process was denied. Our Supreme Court said (p. 6), "The defendant is not in a position to complain error on this ground." Although we requested some explanation as to why—in our Petition for Rehearing (p. 6) our Supreme Court did not see fit to give any further reason.

Cumulative Effect of Errors.

Our Supreme Court refused to recognize the cumulative effect of the errors found to exist. (*People* v. *Strause,* 290 Ill. 259, 289.) In effect our Supreme Court has said that the errors did not contribute to the result, although that court has often said that it is impossible to know what a jury might have done in the absence of error (*People* v. *Lane,* 300 Ill. 422; *People* v. *Heffernan,* 312 Ill. 66; *Nowacryk* v. *People,* 139 Ill. 336; *People* v. *Winchester,* 352 Ill. 237). How can any court of review say that the death penalty would have resulted in the absence of these errors?

Many of the errors committed would not be repeated upon another trial. As the state court has pointed out (p. 6) the reason underlying the rule which gives the trial judge a discretion, in the matter of a witness list, takes into consideration the power to grant a new trial. The defendant could not be surprised again. If the witnesses for the State cannot bear investigation, no verdict should stand anyhow. May we ask, how the State is to be damaged by a new trial,—unless the improbability of another death verdict is worrisome? If a new trial is not granted, the defendant, of course, will be irreparably injured, and this will be a travesty of justice. In *People* v. *Scalise,* 324 Ill. 131, 151, the Illinois Supreme Court examined the facts, and in considering the penalty, said

that from whatever angle viewed it was a mockery of justice. Same should apply here if Weisberg had had a review according to precedent. In considering the penalty, can it be said that the jury was not influenced by the manner in which the case was presented? Weisberg stood upon his constitutional rights and refused to make a statement. The prosecutor said that it was his duty to remain at the scene and to tell his story to the police. The prosecutor said that if he became inflamed because of insults that gave him no rights, and the trial court supported the prosecutor in all of those matters. How can it be said that these violations of the law did not influence the jury? The defense lawyers did the best they could under the circumstances,—but how could they overcome the argument—that no attention should be paid to them—because they would be saying the same things on behalf of the fiend who murdered the Degnan girl? If this all adds up to due process—a new standard has been introduced.

Conclusion.

The record in the case at bar contains no evidence of any motive which would make the defendant desire the death of McKnight. No doubt Weisberg was provoked by the insults heaped upon him, which were aggravated by the drunken condition of both parties to the quarrel. We submit that upon the whole evidence the question should have been whether the defendant was guilty of manslaughter. As we have pointed out, no such issue was submitted to the jury. The death penalty, under the circumstances, shocks one's sense of justice and naturally causes one to wonder how it was brought about. We submit that we have demonstrated from the record the illegal manner in which the prosecutor obtained such a disproportionate penalty. We are convinced that the evidence

is not sufficient to remove all reasonable doubt of the guilt of the defendant, and that the severity of the penalty alone demonstrates the disastrous effect of the errors committed. A reversal of this judgment is required. We submit that the Constitution and laws of Illinois are intended to provide for a trial far different from that afforded to Weisberg, and that the errors are such that due process and the equal protection of the law, as guaranteed by the Fourteenth Amendment, has been denied your petitioner. We submit that the facts set out are sufficient to make applicable the principles announced in *Chambers* v. *Florida*, 309 U. S. 227, and the conclusion there announced that:

> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. *White* v. *Texas*, 310 U. S. 530, 533; *Canty* v. *Alabama*, 309 U. S. 629; *Vernon* v. *Alabama*, 313 U. S. 547."

Respectfully submitted,

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